

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Goreham v. Lamrock*, 2004 NSCA 116

**Date:** 20040929

**Docket:** CA 210110

**Registry:** Halifax

**Between:**

Loretta Caroline Goreham

Appellant

v.

Melbourne Winston Lamrock

Respondent

**Judges:**

Bateman, Oland and Hamilton, JJ.A.

**Appeal Heard:**

September 21, 2004, in Halifax, Nova Scotia

**Held:**

Appeal allowed per reasons for judgment of Bateman, J.A.; Oland and Hamilton, JJ.A. concurring.

**Counsel:**

Gregory D. Barro, for the appellant  
Donald Miller and Jonathan Graham, for the respondent

Reasons for judgment:

[1] This is an appeal by Loretta Goreham from an Order of Judge Robert White of the Family Court permitting access by the respondent, Melbourne Lamrock, to the parties' seven year old daughter.

[2] After a hearing held in the spring of 2000 the late Daley, J.F.C. determined that access was not in the child's best interests. The resulting order, issued July 24, 2000, grants custody to Ms. Goreham. Judge Daley's decision is reported as **Lamrock v. Goreham**, [2000] N.S.J. No. 205 (Q.L.) and provides the background to the parties' circumstances. At that time the father had made an application for access and was seeking joint custody as well.

[3] The family dynamics here are complex in that, at various times, Ms. Goreham has had some form of intimate relationship with the respondent and two of his sons. At the time of the application before Daley, J.F.C. Ms. Goreham was living in a common law relationship with Mr. Lamrock's son, Joseph. Judge Daley wrote:

¶ 8 The animosity between the parents is evident. Many hurtful statements were made on the witness stand and the reactions within the courtroom were mostly negative. The youngest (sic) son with whom the mother lives now, is openly angry and hostile towards his father and does not hesitate to voice his opinion. No useful purpose would be served by repeating the negative evidence submitted by both sides. Much of that given against the father, was denied by him. He presented himself as a loving, responsible, nonabusive and supportive father and spouse. The only relevant conclusion that the court can reach is that the relationships between the pertinent persons - the mother, father and son/common-law spouse of the mother, is so negative that the court concludes there is no common ground from which they can work cooperatively or in the interests of the child. The court does not accept the character of the father that he portrays of himself. On balance, the court accepts the characterization of the father as an aggressive, argumentative and controlling person.

[4] An appeal by Mr. Lamrock from Judge Daley's disposition was abandoned. Instead, Mr. Lamrock applied for a variation of the access arrangement which application was heard before Judge White in August and September of 2003. Ms. Goreham and Joseph Lamrock separated only a few months after the hearing before Judge Daley. They have a son who is in Ms. Goreham's custody.

[5] I would agree with the appellant that Judge White's decision is fatally flawed. Unfortunately the variation application was advanced by counsel for Mr. Lamrock as if it was an appeal of the original order of Judge Daley. Judge White's decision reveals that he was drawn in to that same approach. He effectively went behind Judge Daley's order. Judge White said:

. . . The fact is where was the evidence that during that period of time [referring to events pre-dating Judge Daley's decision] the child was in the care of Mr. Lamrock that the child suffered some kind of damage or hurt [or] was improperly cared for. There is no evidence before me to indicate that. Surely, and with great deference to Judge Daley one has to take into consideration that - that there has to be something legitimate, hard facts that say that the child's life or her well being is being placed in jeopardy for him [not] to have access with the child.

[6] It appears that Judge White did not accept that there was a sound basis for Judge Daley's decision to deny access. As a result, he erred at law in neglecting to consider whether there was a material change in circumstances since the making of that order, which change is the necessary foundation to a variation application (see **Maintenance and Custody Act**, R.S.N.S. 1989, c.160, s. 37). His decision made no mention of the requirement that there be a material change. The judge further erred when, ignoring Judge Daley's order and findings of fact, he presumed that Mr. Lamrock was entitled to access and placed the onus upon Ms. Goreham to establish that access was not in the child's best interests. McLachlin J., as she then was, wrote for the majority of the Supreme Court of Canada in **Gordon v. Goertz**, [1996] 2 S.C.R. 27:

10 Before the court can consider the merits of the application for variation, it must be satisfied there has been a material change in the circumstances of the child since the last custody order was made. Section 17(5) provides that the court shall not vary a custody or access order absent a change in the "condition, means, needs or other circumstances of the child". Accordingly, if the applicant is unable to show the existence of a material change, the inquiry can go no farther: *Wilson v. Grassick* (1994), 2 R.F.L. (4th) 291 (Sask. C.A.).

11 The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was

issued: *Baynes v. Baynes* (1987), 8 R.F.L. (3d) 139 (B.C.C.A); *Docherty v. Beckett* (1989), 21 R.F.L. (3d) 92 (Ont. C.A.); *Wesson v. Wesson* (1973), 10 R.F.L. 193 (N.S.S.C.), at p. 194.  
(Emphasis added)

McLachlin J. was writing in the context of the **Divorce Act**, 1985, c. 3 (2nd Supp.), however, the same principles apply under the **Maintenance and Custody Act**.

[7] In view of these errors and given the passage of time since Judge White's Order I would allow the appeal and remit Mr. Lamrock's application for access to be heard by a different judge of the Family Court.

Bateman, J.A.

Concurred in:

Oland, J.A.

Hamilton, J.A.